

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

MULTIMEDIA KSDK, INC.

Employer

and

Case 14-RC-12419

LOCAL 4, IBEW, AFL-CIO

Petitioner

REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION

The Employer, Multimedia KSDK, Inc., operates a television station in St. Louis, Missouri. The Petitioner, Local 4, IBEW, AFL-CIO, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all full-time and regular part-time producers and assignment editors employed in the newsroom at the Employer's St. Louis, Missouri facility. A hearing officer of the Board held a hearing and the parties filed briefs with me.¹

As evidenced at the hearing, the parties disagree on whether the producers and assignment editors are supervisors. The Employer contends that the producers and assignment editors are supervisors because they have the authority to assign and responsibly direct employees within the meaning of Section 2(11) of the Act. The Petitioner contends that

¹ Pursuant to Rule 102.111, Employer's brief was not timely filed and cannot be considered. Employer received an extension of time until February 3, 2003 to file its brief with the Regional Office. Employer's brief did not arrive until February 4, and I rejected the brief. On February 7, the Employer requested I retroactively grant the extension to February 4, as it had initially requested, and consider the brief timely filed. In support of its request, Employer states it mistakenly believed I granted an extension of time until February 4 instead of February 3, and that no prejudice or significant delay would result. Employer does not provide any grounds, other than its own inadvertence which does not constitute excusable neglect on which to reconsider and the brief remains rejected. See generally *Elevator Constructors Local 2 (Unitec Elevator Services Co.)*, 337 NLRB No. 55, slip op. at 2-3 (2002) (requiring strict application of Rule 102.111).

the producers and the assignment editors are not supervisors and that the petitioned-for unit is appropriate.

I have considered the evidence and the arguments presented by the parties on these issues.² As discussed below, I have concluded that the producers and the assignment editors are not statutory supervisors and that the petitioned-for unit is appropriate. Accordingly, I have directed an election in the petitioned-for unit, which currently consists of 11 producers and 4 assignment editors.

I. OVERVIEW OF OPERATIONS

The Employer operates a television station, locally known as KSDK, which provides television programming. The station is affiliated with NBC and also receives news programming from CNN. The station's functions are divided into departments, such as news, sales, engineering, traffic, accounting, and programming. The news department is the only department at issue here.

The news department presents newscasts Monday through Friday at 5 a.m., 5:30 a.m., 6 a.m., 12 noon, 5 p.m., 6 p.m., and 10 p.m., with the most importance placed on the 10 p.m. newscast. The newsroom also presents "cut-ins," or 5-minute news segments, twice per hour during The Today Show, which is a network production that airs locally from 7 a.m. to 10 a.m. During weekends, the station presents newscasts at 6 a.m. and 9 a.m., plus evening

² Both parties cite past history regarding the supervisory status of the producers. The Union notes that in the early to mid-1980s, the producers were covered by a collective-bargaining agreement and that in 1993, the Employer signed a stipulated election agreement for a unit including producers. The Employer cites the decision in *Multimedia KSDK, Inc. v. NLRB*, 303 F.3d 896 (8th Cir. banc 2002), in which the Court rejected the Board's determination that the producers were not supervisors. While I take administrative notice of the prior decisions involving the producers and the assignment editors, I must determine the status of the producers based upon the evidence presented at this hearing, which was held 5 years after the initial representation hearing underlying the Eighth Circuit decision. *Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB No. 54, slip op. at 1-2, fn. 3 (2001).

newscasts. On Sunday nights, after the 10 p.m. newscast, the station presents Sports Plus, an expanded sports program.

The overall operation of the news department is the responsibility of the news director. Reporting directly to the news director are three executive producers as well as the director of photography and news operations; assignment manager; sports director/anchor; chief meteorologist; managing editor of Today in St. Louis; the news business manager; and the production supervisor/news information technology specialist. All of these positions are considered by the Employer to be supervisory/managerial positions. The news anchors and the reporters also report directly to the news director, except for the sports reporters/anchors who report directly to the sports director/anchor.

Other employees working in the newsroom report to one of these supervisors/managers.³ For example, the photographers and editors report to the director of photography and news operations and/or his assistant; the directors and production assistants report to the production supervisor. The four assignment editors report to the assignment manager. The sports director/anchor supervises the two sports producers, one of whom is part time. The PM executive producer supervises five producers; the executive producer for special projects supervises the special projects producer; and three producers are under the supervision of the AM executive producer. The AM executive producer position has been vacant since December 2002, but is expected to be filled. The managing editor for the Today in St. Louis program, who is also an anchor for the program, has overall responsibility for that program and two of the three producers who would report to an AM executive producer are

³ The Employer employs approximately 23 photographers, 7 editors, 1 photo archivist, 5 student interns per semester, 15 reporters/anchors, 3 sports reporters/anchors, 3 meteorologists, 4 directors, 8 production assistants, and 1 archivist.

assigned to that program. Even when not at work, the news director, executive producers, and the assignment manager are available at all times via phone and/or page.

Each of the producers is assigned by management to a specific program. The special projects producer assists the special project executive producer in the preparation of the cover stories, which are the feature stories airing during the weekday 10 p.m. newscasts. These cover stories are shot in advance. The producer helps research those stories, assists the reporters in completing the stories, and performs other duties as assigned by the executive producer. The two sports producers serve more as assistant producers to the sports director who also anchors the sports. The sports producers help the sports director coordinate coverage of sports; they write scripts, prepare video, gather satellite feeds, and consult with the sports director to properly prioritize the sports information based upon local interest. The other producers are each assigned to produce a specific newscast. Two of the producers are assigned weekend newscasts and perform other duties during the week. Generally, all of the producers, when not working on their assigned programs, will assist with such duties as writing script and taking dictation from reporters in the field.

Each newscast has a fairly standard format. The traffic department dictates when and which commercials will be aired. The sports, weather, cover stories, prepackaged pieces such as Healthbeat, and franchise pieces supplied by the network, such as the Bloomberg Reports, are regularly aired for a set period of time and order. The daily news is covered in blocks of established times and places in the newscast.

Planning for news coverage takes place during the daily news department editorial meetings. These meetings are held each weekday at 7 a.m., 9:30 a.m., and 2:30 p.m. Anyone from the news department is encouraged to attend these meetings. Attendance varies depending on the time of the meeting, but an executive producer or the managing editor, producers, assignment editor, and some reporters who are working that shift always attend. Other personnel attending as available include editors, anchors, directors, photographers,

production assistants, control room crew, the special projects executive producer, the assignment manager, and the news director.

During these meetings, everyone is encouraged to provide story ideas. Producers provide many ideas as do the reporters, who frequently state what stories that they would like to cover or are in the process of covering. Some stories are obviously lead stories, such as the President's visit to St. Louis or a five-alarm fire. Market research also guides the story selection, based upon the viewer target audience. The meeting attendees usually determine by consensus what stories will be covered for a particular newscast and how they will be covered, i.e. by what reporter, whether the coverage will be live or packaged, etc. On the very rare occasions that consensus is not reached, the executive producer or the managing editor has the ultimate authority to decide.

After the meeting, the plan for news coverage is implemented. The assignment editor dispatches the reporters, photographers, and equipment as discussed in the meeting. The producer prepares the rundown for his assigned newscast. The rundown is an electronic document, available to everyone in the news department, and contains detailed instructions for the newscast, including the order and length of time for each story and segment of the show, as well as the commercials. An executive producer or other manager reviews the rundown. During the course of the day, the producer may change the rundown depending on the development of the news during the day.

During the newscast, the producer and the director sit in the control booth for the broadcast studio. The producer communicates directly with the anchors and other personnel during the broadcast by headphones. The producer ensures that the rundown is followed and if problems arise, can shorten segments, drop or alter stories. Each newscast is monitored by an executive producer or other manager. This manager generally sits in the newsroom and may communicate with the producer through the intercom or by walking into the control booth. Anchors and reporters are at their appointed stations or in the field.

After each newscast, the executive producers or manager and the participants attend a post-mortem meeting. During the post-mortem, the participants discuss what they liked or disliked about the newscast and begin discussion of the next newscast. For the morning post-mortems, the participants also discuss any needs for the following day's newscasts.

II. OVERVIEW OF APPLICABLE LAW

Before examining the specific duties and authority of the producers and the assignment editors, I will briefly review the requirements for establishing supervisory status. Section 2(11) of the Act defines the term supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The burden of proving supervisory status lies with the party asserting that such status exists. *National Labor Relations Board v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001). In order to prove supervisory status, the party asserting such status must follow the Act's three-part test. Employees are statutory supervisors if (1) they engage in any one of the 12 listed supervisory functions; (2) their "exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment", and (3) their authority is held in the interest of their employer. *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-574 (1994).

In enacting Section 2(11), Congress distinguished between true supervisors, vested with "genuine management prerogatives", and those who are entitled to protection of the Act even if they perform minor supervisory duties. S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947), cited in *Providence Hospital*, 320 NLRB 717, 725 (1996). The Board frequently warns against construing supervisory status too broadly because an employee deemed a supervisor loses the protection of the Act. *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman*

Deaconess Hospital, 322 NLRB 1107, 1114 (1997). The inquiry into supervisory status must differentiate between “the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestions, and between the appearance of supervision and supervision in fact.” *Training School at Vineland*, 332 NLRB No. 152, slip op. at 5 (2000).

The Board retains discretion to determine, within reason, what scope or degree of “independent judgment” meets the statutory threshold. *Dynamic Science, Inc.*, 334 NLRB No. 57, slip op. at 1 (2001). The question of whether a certain group of employees are statutory supervisors is determined on a case-by-case basis through an examination of “actual job responsibilities, authority and relationship to management.” *Noranda Aluminum, Inc. v. NLRB*, 751 F.2d 268, 269 (8th Cir. 1984). Proof of supervisory status cannot be satisfied by general conclusory claims or by proof of paper authority. *Franklin Hospital Medical Center d/b/a Franklin Home Health Agency*, 337 NLRB No. 132, slip op. at 4 (2002). Where evidence is inconclusive or in conflict, the Board will not find that supervisory status is established based upon such evidence. *Phelps Community Medical Center*, 294 NLRB 486, 490 (1989), cited in *North Shore Weeklies, Inc.*, 317 NLRB 1128, 1130 (1995). Lack of evidence also is construed against the party asserting supervisory status. *Michigan Masonic Home*, 332 NLRB No. 150, slip op. at 1 (2000).

The parties agree and the record contains no evidence that the producers and the assignment editors have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees or to effectively recommend such actions. The Employer contends that the producers and assignment editors have the authority to assign, including the assignment of overtime, and to responsibly direct employees. Accordingly, my analysis for each position is limited to those two indicia.

III. STATUS OF PRODUCERS

The news director testified generally that the producer has overall responsibility for his assigned newscast, from planning to presentation. To fulfill that responsibility, the producer assigns and directs the work of other news department employees including the reporters, photographers, anchors, editors, graphic artists, directors, and meteorologists.⁴ Depending on how their work progresses and the news develops, the producer must adapt the planned newscast both before and during the actual broadcast.

As discussed above, the stories for a particular newscast are generally selected by consensus during the editorial meetings. The assignment of reporters to particular stories is also discussed. Although the news director testified generally that the producers may assign reporters to particular stories, the producer testified that, in reality, the selection of a particular reporter was a luxury, occurring maybe every few weeks, and that the selection was made in consultation with the executive producer. Moreover, the reporters' shifts and their regular "beats" or areas of specialty are determined by management.

Reporters do call in during the day and speak to the producers about the progress of their stories, inform the producer as to what information and film footage they may have obtained and may dictate the script of their story. Although the news director testified that the producer has the authority to tell the reporter how to cover a story or to change the story, the producers testified that changes are generally made in consultation with the executive producer and, although the producer may suggest an angle or further information, the reporter

⁴ The producer's job description, prepared by the news director in September 2001, states that the producers "direct and supervise" these employees.

determines whether such information will be obtained, because the reporter is in the field and in a better position to judge. One producer cited an example that she was disappointed with a reporter's failure to interview bystanders on a story rather than police officers, as the producer and executive producer had requested. The producer stated that she told the reporter she was disappointed and reported the situation to the executive producer. As of the hearing, the executive producer had not "gotten back" with the producer as to what action, if any, he had taken.

The producers testified that although they may make suggestions as to which photographer should cover a story, that suggestion may or may not be followed. A producer testified that the photographers, as well as the reporters, do not need instructions on how to accomplish their work, but simply are told where to go and the story desired.

The news director testified in conclusory fashion that although the producers do not schedule any employees, the producer has the authority to authorize overtime for reporters, photographers, and other employees, if necessary. No evidence was presented that a producer has ever authorized overtime. A producer testified that she had never authorized overtime and that she would check with management prior to authorizing overtime.

The producers write many of the scripts for the stories to be read during the newscasts as the Employer employs no writers. The producers also may ask others to write script, including the anchors, other producers, reporters, or anyone else in the newsroom who is available. At times, the executive producer may also help with the writing. The record does not establish on what basis, other than availability, the writer is selected. The executive producer reviews most scripts, as does the producer, as time permits. The executive producer or other manager must approve the broadcast of any controversial stories or questionable or graphic video.

Producers also give work to the editors assigned to their newscast. Any story that involves video, whether locally produced or provided by the network or other sources, requires

editing. The reporters work directly with the editing department on their own pre-recorded packages. When a producer needs a story edited, the producer posts the story on a bulletin board in the editing department, located off the newsroom. The editors take assignments from the bulletin board as they finish their previous tasks. If special instructions are involved, the producer may notify an editor. In some situations, the producer may ask one editor to handle a specific story because one editor is known to edit work fast or another may be more “creative.” However, if the desired editor is already occupied, the producer does not have authority to make the editor take the story and is “out of luck”. The record does not reflect how frequently these special requests might occur. The producer does not always review the edited video before it airs.

The producers may request, by computer, that the graphics department develop graphics for a newscast. The graphics department accesses the requests from the computer. The graphics department is aware that the station wants its graphics to have a certain look or “feel” and develops the desired graphics. In rare circumstances, a producer may not like a graphic and request that it be redone or changed.

The producers also determine which anchor will read which story. One producer described the process as fairly “random,” driven primarily by the need to divide the stories equally between anchors and to alternate the anchor reading during the course of the newscast. Other considerations include whether the anchor has a particular interest in a story or if an anchor developed a particular story.

Throughout the course of the day, news stories change or do not develop as planned and other news may break. The producer must keep abreast of these developments and change the rundown accordingly. The news director testified that the producer has the authority to change the rundown, for example, remove or alter the placement of commercials, change the order and length of the stories, sports and weather, or drop any stories. The producers testified, however, that they never dropped a commercial and that they would check with their executive

producer before making any “radical” or “big” changes, which one producer defined as something that is not format or that had not been done before, and the other defined as any change other than “no brainer” changes. One producer testified that she tries to consult with the executive producer prior to making any changes in the rundown.

During the broadcast, the producer is supposed to ensure that the show airs with minimal errors and that the show does not go over time. The producer cues reporters who are reporting live from the field. The producer also provides cues to keep segments from exceeding their allotted time. If a segment exceeds its allotted time, such as weather running 20 seconds too long, the producer must make appropriate adjustments in other stories to compensate for the excess and get the newscast off the air on time. Similarly, if a story is lost, e.g. equipment malfunction kills a live shot, the producer must determine how to adjust the story or otherwise compensate. These adjustments may include moving stories around, dropping a story of the appropriate length completely or telling a reporter, anchor, sportscaster, or meteorologist to cut their presentation short. There is no evidence that the producer tells these individuals how to cut their presentation or how the producer decides what to cut or what to move. One producer testified that she acts as a liaison between all key players, such as the director, the anchors, and the tape operators.

Major deviations in a newscast appear usually to be the result of breaking news or a live event, such as the Golden Globe awards, the State of the Union address, or sporting events. With respect to breaking news, the executive producer or other manager is generally in the newsroom and is the one who receives the breaking news and delivers the information to the producer in the control room. One producer testified that she assumed that if the executive producer was informing her of breaking news, then that executive producer wanted the news on the air and she would see that it aired. With respect to the live network events, the network issues “operating conditions” so that the local stations may plan ahead for certain contingencies that could change the length of the news or the leading story. The operating conditions are

based on time cues and are considered strict guidelines, which must be followed to adjust the length of the news program, such as reducing the amount of time allocated for the weather and the commercials to be deleted.

The news director testified that the producers are held responsible for the entire newscast. As evidence, he cited three memoranda taken from the personnel file of one of the producers. In the first memo, issued to both the producer and the reporter, the news director reminded them to double-check, by calling, telephone numbers that will be presented on air, as the number run in a previous newscast was incorrect and caused viewer complaints. In the second memo, the news director admonished the producer for not fully developing a story about a local business by checking with the business itself, which resulted in inaccuracies. The third memo also admonished the producer for failing to develop adequate information. The second and third memo involved stories that the producer himself had researched and prepared inadequately. The producers testified that they are not criticized for mistakes made by other employees during a newscast, rather the criticism is directed at the employee who made the mistake.

The record establishes that the executive producers and other managers, except for the sports director, are not scheduled to work on the weekends. The record contains no evidence regarding how the stories and news are developed on the weekend. As the AM executive producer position is currently vacant, the noon news producer is not nominally supervised.⁵ However, the evidence establishes that the content of the noon news is covered in the morning editorial meetings and that other managers and executive producers are present both during the noon newscast and its preparation.

Analysis

1. Assign

⁵ The production of the early morning news falls under the Today in St. Louis show, which is the responsibility of the managing editor.

The Employer has failed to establish that the producers utilize independent judgment for their assignments. It is undisputed that the producers do not schedule any employees, and there is insufficient evidence that they have authority to assign overtime. The only evidence that the producers utilize independent judgment in the assignment of work is based on the conclusory testimony of the news director and the job descriptions. Proof of supervisory status cannot be satisfied by such general conclusory claims or by proof of paper authority. *Franklin Home Health Agency*, 337 NLRB No. 132, slip op. at 4. Job titles or job classifications, by themselves, also do not demonstrate supervisory authority. *Bozeman Deaconess Hospital*, 322 NLRB at 1114.

Moreover, the conclusory testimony of the news director is contradicted by the more detailed testimony of the two producers. Where evidence is inconclusive or in conflict, the Board will not find that supervisory status is established based upon such evidence. *Phelps Community Medical Center*, supra. Lack of evidence also is construed against the party asserting supervisory status. *Michigan Masonic Home*, 332 NLRB No. 150, slip op. at 1 (2001).

The testimony of the producers indicates that the selection of news stories and the reporters and photographers to cover them appear to be the result of consensus and availability. Any changes in the assignments are made with the approval of an executive producer. The only record evidence of criteria for writing assignments is availability. Editing and graphics assignments are also generally based on availability and the assignment of anchors to read during the broadcast is based primarily on equal distribution, alternating the anchor, and random choice. To the extent that the producer is solely responsible for these assignments, these assignments, based on such factors as availability, random choice, and equal distribution of work, are routine, obvious and do not require independent judgment. *Franklin Home Health Agency*, 337 NLRB No. 132, slip op. at 5. Moreover, the producer's input into the collaborative process of selecting and assigning stories, particularly where the executive producer has final say and is part of the process, is not authority or an effective

recommendation, but more in the nature of a forceful suggestion. See generally *Training School at Vineland*, 332 NLRB No. 152, slip op. at 5. In the absence of concrete evidence, Employer has failed to establish that the producers exercise independent judgment in assigning work. *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 990 (D.C. Cir. 2001); *Franklin Home Health Agency*, supra.

2. Responsibly direct

Responsible direction requires that the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs. *Franklin Home Health Agency*, 337 NLRB No. 132, slip op. at 6. Although the news director testified that the producer is held responsible for every aspect of the newscast, the evidence is to the contrary. Criticism for errors is directed to the news department employee who makes the error and the producers are not criticized or disciplined for the errors of other news department employees. See *Telemundo de Puerto Rico, Inc. v. NLRB*, 113 F.3d 270, 275 (1st Cir. 1997), enf. 321 NLRB 916 (1996).

The memos offered by the Employer do not establish this responsibility. The latter two memos were directed to the producer's own journalistic efforts rather than to another employee's work. The first memo criticized both the reporter and the producer for not double-checking a phone number. That memo only establishes that both individuals are responsible for double-checking phone numbers before they air, and is insufficient, on its own, to establish the producer's overall responsibility for the newscast. The record provides no other examples of holding the producer responsible for any other aspects of other employees' work or how they perform it. The absence of such specific evidence is construed against the Employer. *Franklin Home Health Agency*, supra; *Michigan Masonic Home*, 332 NLRB No. 150, slip op. at 1; *Post-Newsweek Stations, Capitol Area, Inc.*, 203 NLRB 522, 523 (1973). Moreover, when the conclusory evidence is controverted, supervisory status is not proven. *Phelps Community Medical Center*, supra.

Nor does the record establish that the producers exercise independent judgment in their direction of employees. Producers initially prepare the rundown based on the standard format for the particular newscast and the decisions made during the editorial meetings. Any proposed changes to the rundown, other than perhaps “no-brainer” or routine changes, are checked with an executive producer or manager. In general, any decision in a matter that is not routine, e.g. use of graphic video or controversial material, is made in consultation with an executive producer or other manager. This evidence establishes that the producers do not exercise independent judgment in the preparation of the rundown.

The rundown then provides the format for the production of the newscast. The producer uses this rundown as the basis for his directions to the participants during the newscast, e.g. to keep anchors within their allotted times and cue the reporters in the field. Even in cases where certain programming takes away time from the newscast, e.g. sporting events or presidential addresses, the producer must follow the operational guidelines, which are given in advance. This use of established protocols, practices, and procedures does not require a sufficient exercise of independent judgment to satisfy the statutory definition. *Beverly Enterprises v. NLRB*, 148 F.3d 1042, 1047 (8th Cir. 1998); *Franklin Home Health Agency*, 337 NLRB No. 132, slip op. at 5. This situation is differentiated from one in which the producers are not required to adhere to the format and can change the lead story if they so decide. See *Hearst Broadcasting Corp. d/b/a WDTN-TV*, 267 NLRB 326-327 (1983) (producers could change format, change length of the story, change assignments made by assignment editors, tell reporters what angle to use for a story, and could discipline and effectively recommend discipline).

The only apparent time the rundown is not followed occurs in the situation of breaking news, equipment failure, or other glitch which results in a story not being prepared on time, or when one segment runs over, e.g. a weather person talks too long. The record contains no evidence as to how often these situations occur. Nevertheless, the record establishes that the producer must make adjustments during the newscast to accommodate these situations so that

the newscast ends on time. The adjustments can include moving stories around, dropping a story of the same length of time that must be made up, or telling a reporter doing a live broadcast to cut it short. The record does not establish that the producer tells the reporter or anchor specifically what part of their story they must cut, just that they have a certain amount of time. Moreover, the record does not establish how the decisions are made as to what to cut or move to meet the time constraints. The testimony of the news director that the producers make these decisions based on their experience and their judgment is merely conclusionary and cannot be relied upon, particularly in light of the evidence that an executive producer or other manager monitors the newscast from the newsroom and assists in coordinating coverage of breaking news, as well as delivering that information to the producer. He also may coordinate fixing the broken equipment and adjusting the newscast. In these circumstances, where there is no concrete evidence that the producers utilize independent judgment during the newscast and where the conclusionary evidence is controverted, the Employer has failed to establish that the producers exercise independent judgment in their direction of employees during the newscast. *Phelps Community Medical Center*, supra; *Franklin Home Health Agency*, 337 NLRB No. 132, slip op. at 4.

Absence of close supervision does not necessarily equate with independent judgment in responsibly directing tasks or personnel. *Golden West Broadcasters-KTLA*, 215 NLRB 760, 761-762 (1974). While the producers have occasion to work alone, the producers have access to executive producers and the news director, either via pagers or telephone, at all times and could call those managers if any significant problems arise. Even though the producer may not have a manager available in the building, failure to have a manager on site does not confer supervisory status upon the producers. *Telemundo de Puerto Rico*, 113 F.3d at 274-275 and fn. 2.

The producers don't responsibly direct, but rather are part of an integrated production team in which they collaborate with others to present a program, with each member

independently executing his or her responsibility. *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273 (5th Cir. 1986); *Westinghouse Broadcasting Co.*, 215 NLRB 133 (1974). While they must give some directions to others in the course of performing their duties, the directions relate to discrete tasks to be performed, such as shortening a segment to fit into the established time frame; there is no convincing evidence that they direct the employees beyond such discrete tasks. As noted above, the Employer failed to establish that producers are “responsible” for the work of other team members within the meaning of Section 2(11) of the Act. Finally, any direction given by the producers is circumscribed by established formats and policies, and does not involve sufficient independent judgment to meet the statutory requirement.

Accordingly, I find that the producers are not supervisors within the meaning of the Act.

IV. STATUS OF ASSIGNMENT EDITORS

The assignment editors coordinate the newsgathering efforts throughout the news day. They make phone calls and collect information from sources such as the wire services and newspapers. The assignment editors also dispatch the photographers and reporters. The assignment editors do not have any input in the staffing of the photographers and reporters nor do they schedule the shifts of any employees. The photographers and reporters are scheduled by the news business manager based upon determinations of staffing needs made by the news director and the director of photography.

The assignment editors work at the assignment desk and report to the assignment manager. The assignment manager is scheduled Monday through Friday, from 9:30 a.m. to 6:30 p.m. He is accessible at all other times via pager and telephone. The assignment manager is responsible for the efficient functioning of the assignment desk.

The assignment desk is located in the middle of the newsroom, which is an open space. The assignment manager, production assistants and producers, particularly when writing stories, work in the same area. The assignment editors work with computers and utilize an assignment board to keep track of the reporters, photographers, and equipment. The

assignment board is a dry erase board located behind the assignment desk. The assignment board is designed to reflect the newsgathering activities of the day; it lists the various stories being covered, the status of the stories, and the staff involved.

Assignment editors participate in the daily editorial meetings. During the meeting, the assignment editor is aware of the reporters, photographers, and equipment available. An example presented at hearing was that, after the 7 a.m. meeting, one or two reporters and two photographers would be in the newsroom and available for assignment. Before 7 a.m., however, only one reporter is available. After the editorial meetings, the assignment editor dispatches the reporters, photographers, and equipment pursuant to the decisions made in the meeting.

The nature of the story, as well as availability, frequently determines the staff and equipment to be assigned to cover the story. The live trucks, which utilize microwave signals, are usually sent for live shots. The satellite truck is only used when necessary. Only three photographer/editors and a maintenance technician are qualified to operate the satellite truck. Certain photographers are known to be more skilled at obtaining helicopter video. The news director testified generally that the assignment editors will readjust assignments to ensure that photographers with specific skills cover certain stories or they select photographers with a “touch” for a specific type of story. For example, one photographer is exceptional at shooting sports so the assignment editors will attempt to send that photographer on sports assignments. However, when pressed for examples, the news director testified that he overheard the assignment manager discuss the frequent assignment of the one photographer to the sports department. This evidence does not establish that the assignment editors made this determination independently based on their own assessment of the photographer’s skills.

The news director also testified that in breaking news situations, the assignment editor has the authority to tell reporters and photographers “what to do”, and any dispute may be brought later to the attention of the assignment manager or news director. However, no

examples of these types of events were presented nor was any evidence presented regarding the decision-making process.

The news director testified that during the course of a shift, the assignment editors may determine when photographers take lunch. Photographer lunch schedules are constrained by their collective-bargaining agreement, which requires that photographers must take their lunches within the second and sixth hour of the shift or the station must pay a premium. The news director testified that an assignment editor has the authority to decide not to allow a photographer to take lunch within these parameters and cause the Employer to pay the required premium to the photographer. No witness provided an example of an assignment editor autonomously incurring a premium on a photographer's lunch.

The news director also testified that the assignment editors have the authority to assign overtime. He testified that the Employer would prefer the assignment editors "consult" with management, but they are empowered to assign overtime if no one is available and the decision to require overtime has to be made immediately. A recent memorandum issued by the assignment manager to the assignment editors states that overtime should be utilized only for breaking news. The record contains no examples of assignment editors authorizing overtime without the consent of their manager nor could the news director state from personal knowledge that assignment managers have done so. The record does not indicate whether overtime is mandatory when offered by an assignment editor or any other manager.

Anaysis

1. Assign

The Employer has failed to establish that the assignment editors utilize independent judgment for their assignments. It is undisputed that the producers do not schedule any employees. The only evidence that the producers utilize independent judgment in the assignment of work is based on the conclusory testimony of the news director. Proof of

supervisory status cannot be satisfied by such general conclusory claims. *Franklin Home Health Agency*, 337 NLRB No. 132, slip op. at 4.

The record establishes that the determination of who to assign to a particular story is frequently made in the daily editorial meetings, rather than by the assignment editor. Moreover, the assignment of photographers is frequently constrained by the type of equipment required for the coverage, the availability of that equipment, and the known individuals able to operate that equipment. The matching of known skills and equipment is considered routine assignment instead of supervisory. *Franklin Home Health Agency*, 337 NLRB No. 132, slip op. at 5; *King Broadcasting Co., d/b/a KGW-TV*, 329 NLRB 378, 382 (1999). An assignment editor likewise does not exercise independent judgment when assignments are made based upon availability, as scheduled by management. *McGraw-Hill Broadcasting Co., Inc., d/b/a KGTV*, 329 NLRB 454, 456 (1999).

Although the news director testified that the assignment editors have the authority to tell photographers and reporters what to do during breaking news and assign photographers based on their assessment of their skills in filming certain types of events, this evidence was conclusory and does not satisfy the Employer's burden of proof. *Franklin Home Health Agency*, 337 NLRB No. 132, slip op. at 4. Similarly, the news director's statements that the assignment editors could incur lunch premiums and authorize overtime cannot be relied on. This evidence was conclusory. Moreover, the record lacks any evidence disclosing how assignment editors decided to authorize overtime or premium work during lunch or if they had the authority to compel such work. In these circumstances, the evidence is insufficient to establish that the assignment editors exercised independent judgment in the assignment of work. *Franklin Home Health Agency*, supra. This lack of evidence must be construed against the Employer, as the party asserting supervisory status. *Michigan Masonic Home*, 332 NLRB No. 150, slip op. at 1.

2. Responsibly direct

The record simply does not demonstrate that the assignment editors responsibly direct employees. The conclusory testimony that assignment editors can tell reporters and photographers “what to do” in the case of breaking news is insufficient. Because the Employer has not demonstrated that the assignment editors use independent judgment in making assignments or are involved in responsibly directing employees, I find that the assignment editors are not supervisors within the meaning of Section 2(11) of the Act.

V. APPROPRIATE UNIT

I find that the producers and assignment editors share a community of interest and that the petitioned-for unit is appropriate. The evidence establishes that the producers and assignment editors work in the same proximity and have daily contact in the course of their duties. The producers and assignment editors share similar terms and conditions of employment. Their salary ranges are comparable, and generally, the producers and assignment editors are paid less than the reporters, anchors, photographers, directors, and editors. They are paid more than the production assistants, who are hourly paid and work part-time. As these other non-supervisory news department employees are currently represented, a unit limited to the producers and assignment editors is appropriate. Neither party apparently contends otherwise.

VI. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.⁶

⁶ The Employer, a South Carolina corporation, with its sole office and broadcasting facilities located in St. Louis, Missouri, is engaged in the operation of a television broadcasting station. The Employer has

3. The Petitioner claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time producers and assignment editors employed by the Employer in its news department at its St. Louis, Missouri facility, EXCLUDING office clerical employees, guards and supervisors⁷ as defined in the Act, and all other employees.

VII. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Local 4, IBEW, AFL-CIO.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately prior to the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls.

annual gross revenue in excess of \$100,000 per year, and annually purchases and receives broadcast programming and news services valued in excess of \$50,000 at its St. Louis, Missouri facility directly from points located outside the State of Missouri.

⁷ The parties stipulated that the assignment manager and executive producers are statutory supervisors.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director for Region 14 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 1222 Spruce, Room 8.302, St. Louis, MO 63103, on or before **February 27, 2003**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (314) 539-7794. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by

facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **March 6, 2003**. The request may **not** be filed by facsimile.

Dated November 12, 2003

at Saint Louis, Missouri

Ralph R. Tremain, Regional Director, Region 14

177-8501-5000
177-8520-2400
177-8520-4700
177-8560-4000
177-8580-2700